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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 817

THOMAS F. BUCK and MARY P. BUCK,
Appellants,

vs.

STATE OF NEW JERSEY,
by the State Highway Commissioner,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Counsel for Appellants,
[illegible]

THOMAS RAEBURN YOUNG,
Of Counsel and
on the Brief.

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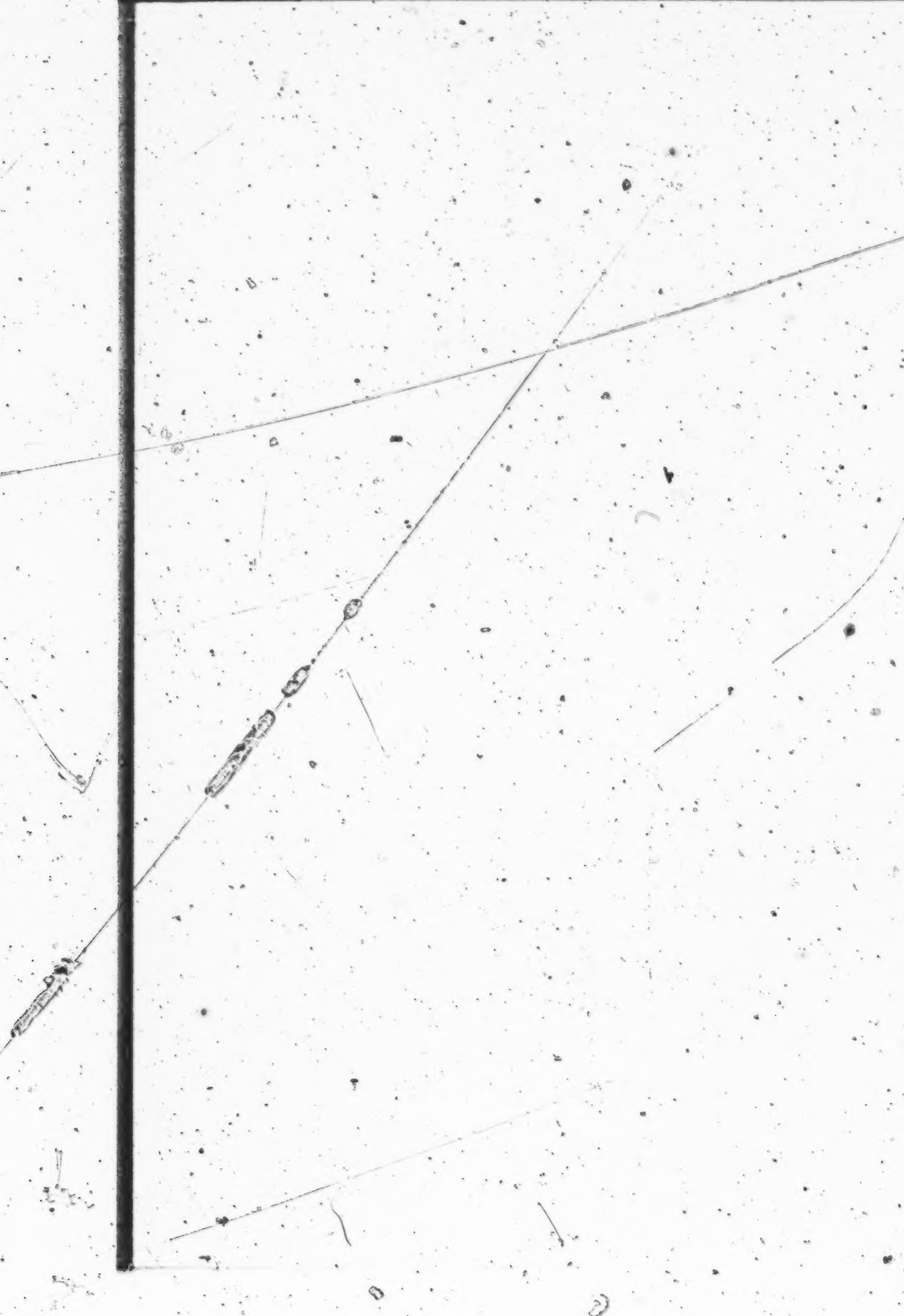

Before proceeding to their brief in opposition to the Appellee's Motion, Appellants rsepectfully wish to correct the record and take issue with several factual representations made in the Motion to Dismiss:

In its "Statement of the Case:, the Appellee, at page 3, makes the factual statement "defendant also contests the state's rights to take another portion of the property, bu has since waived as to that portion." This statement is not factual. Appellants did originally waive (D45a-3 to 9) with respect to other disputed portions of the property but, following introduction of new maps by the Appellee, the waived portions came back into controversy (D117a-12 to 19).

Further, by its "Statement of the Case:, Appellee states "the Sheldrick acreage will thereby be available for development. . . . ." This statement is not factual and creates an erroneous impression. The fact is that the Sheldrick acreage is only 5.308 acres and the local zoning ordinance (as stated in Appellee's "statement of the case: at page 4) requires a minimum lot size of 3 acres—though effectively identifying this property as a single lot.

Further development is possible according to the existing zoning laws.

It is difficult for Appellants to understand or appreciate Appellee's statement in "II" (page 9) in its Motion to Dismiss that the "roadway will be . . . upon to use by the public at large . . . ." It is so clear from both the testimony and the exhibits that the proposed driveway is only a 590 foot long six inch gravel, 10 foot wide, driveway, from a "dead-end" roadway to a neighbor's private single family residence property, that Appellants are simply unable to conclude how the Appellee's submits as a fact that such driveway is open to public use.

ARGUMENT

POINT I

The lack of validity of the statute under attack was previously in the courts below.

Appellants questioned the validity of N.J.S.A. 27:7A-4.1 in the following instances:

A. Law Division of the New Jersey Superior Court

The validity of the statute was questioned in this trial court by the memorandum of law submitted by defendants and by oral argument of counsel for defendants (D125a-22 to D126a-1, 2) and (B129a-10 to 16).

B. Appellate Division of New Jersey Superior Court

The validity of the statute was again attacked by Appellants in Part IV of the Brief in this court as well as in all argument when the matter was heard.

C. Supreme Court of New Jersey

Appellants, again, attacked the validity of the statute in question in Points III, IV and V of the Petition for Certification.

POINT II

The questions are substantial.

It is ludicrous to state that the question before this court is not substantial. Fundamental to the concept of freedom is the right to own land and fundamental to the Constitution is the inhabitation of any state agency to take private land for private use. Appellants do not wish to burden this

court with an exhaustive review of the massive weight of cases which have been heard before this court earlier on this issue of jurisdiction.

Mr. Justice Grey, speaking for this unanimous court, in *Missouri Pacific Railway Co.* v. *State of Nebraska, etc.* (1896) 164 U. S. 403, 41 L. Ed. 489, stated:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is violation of the 14th Amendment of the Constitution of the United States."

See also *Cole* v. *LaGrange,* 113 U. S. 1, 28 L. Ed. 896; *Wilkinson* v. *Leeland,* 27 U. S. 2, 7 L. Ed. 542; *Davidson* v. *New Orleans,* 96 U. S. 97, 24 L. Ed. 616 and *Madisonville Traction Co.* v. *St. Bernard Mining Co.,* 196 U. S. 239, 49 L. Ed. 462.

In the *Madisonville Traction Co.* case, *supra,* Mr. Justice Harlan, speaking for the majority, said, in part:

> "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments."

and Mr. Justice Grey, again, in the *Cole* v. *LaGrange* case, cited hereinabove, stated:

> "The general grant of the legislative power in the constitution of a state does not enable the legislature in their exercise either of the right of eminent domain

or of the right of taxation, to take private property, without the owner's consent, for any but a public object."

See also *Citizen's Sav. & L. Assoc.* v. *Topeka,* 20 Wall 655, 22 L. Ed. 455 and *Chicago B.Q.R. Co.* v. *Chicago,* 166 U. S. 226, 41 L. Ed. 979.

In addition to being of substantial constitutional interest the present accelerated rate of social progress in America dramatizes the urgency of the issue before the court. In 1962, as reported by the Committee on Public Works to the 88th Congress, Second Session, from Federal sources alone (excluding state, county, municipal and other condemning agencies) 1,480,000 acres were required per year. This requested an annual expenditure of $1,291,200,000 and represented 154,790 separate and individual "takings" each year. The rate of increase of these "takings" is approximately 25 per cent.

CONCLUSION

The law is well settled that the determination of what constitutes a public use is a judicial one. The matters set forth in the jurisdictional statement and in this brief make a clear case of substance in the matter before the court and the Motion to Dismiss should, therefore, be denied and jurisdiction noted herein.

Respectfully submitted,

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